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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1017.

THE INTERLAKE STEAMSHIP COMPANY,
Petitioner,

vs.

MARCELLA R. NIELSEN, and STEPHEN O'HEARNE,
Deputy Commissioner,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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The Interlake Steamship Company petitions for rehearing of the Court's June 1, 1965, denial of certiorari because:

1. Since Nielsen was decided by the Sixth Circuit, question concerning the reach of admiralty jurisdiction has arisen in four circuits, the Second, Fourth and Fifth, and in a yet later case in the Sixth. Each has applied a different standard.

Nielsen arose under the Longshoremen's and Harbor Workers' Compensation Act. The statute applies "*only if* the disability or death results from an injury occurring upon the navigable waters of the United States * * *." 33 U. S. C. 903(a). As the statutory history and *Calbeck v. Travelers Insurance Co.* (1962), 370 U. S. 114, show,

the reach of the statute and the reach of admiralty jurisdiction coincide. But, an astonishing contrariety of rule, commencing with *Nielsen*, has come to pass, *viz*:

(a) IN THE SIXTH CIRCUIT there are now two standards:

> In this case, *Nielsen*, 338 F. 2d 879 (decided December 3, 1964), where the shipkeeper drove his automobile off the end of the dock, Judges Edwards, Weick, and Prettyman (reversing the decision of Judge Jones in the District Court) held the injury occurred "upon the navigable waters of the United States" because, the court reasoned, nothing happened until the automobile landed on the navigable waters of Maumee Bay. The point to note is that the Court of Appeals held, not the place of origin, but the *place of consummation* of the injury controlled.
>
> Eight weeks later, in *Wiper v. Great Lakes Engineering Works* (6 C. A., 1965), 340 F. 2d 727 (decided January 29, 1965), where a ship's engineer fell off the dock and drowned in navigable waters, Judges Brooks, Miller and Edwards applied a different standard in determining whether admiralty law governed. This time the Court of Appeals held that because the decedent fell *from the dock*, the case was governed by state law—the law of the shore and *not* the law of the sea. As will be observed. the court held controlling the place *where the accident originated*, and not the place where the injury was consummated.

In both cases the train of events started on the dock; in both decedent met death in navigable waters. In one

case (*Nielsen*) federal law was held to govern; in the other (*Wiper*) state law was held to govern. To be sure, *Nielsen* arose under the Longshoremen's Act, whereas in *Wiper* claim was asserted for "a maritime tort." 340 F. 2d at 729. The test of jurisdiction, however, cannot rationally differ from the one case to the other.

The only explanation the Court of Appeals gave for its different rule in *Wiper* was (340 F. 2d at 730):

> "There [in *Nielsen*] the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 903(a), was held to extend to a claim for injury or death when the situs of the injury or death was in navigable waters regardless of whether the cause had a land-based origin. In the present case it is the locality of the tort that governs the question of whether maritime or state law is applicable rather than the locality where the injuries or death occurred which, as held by *Interlake*, determines coverage under the Longshoremen's and Harbor Workers' Compensation Act. For these reasons then, there is no merit to plaintiff's claim that the tort here in question occurred in navigable waters."

This would appear to be a plain case of circular reasoning. It emphasizes the need for inspection here. For what is outside the reach of the admiralty law in the one case must also be in the other, if words are to have meaning.

(b) In the Second Circuit in *Michigan Mutual Liability Co. v. Arrien* (2 C. A., 1965), 344 F. 2d 640 (decided April 5, 1965, four months after *Nielsen*), the Court of Appeals (Judges Kaufman and Moore, with Judge Hays dissenting) gave the statute a different construction. The majority held the case covered by the Longshoremen's and Harbor Workers' Compensation Act, not because the workman fell into navigable waters, but because the

structure, temporarily affixed to the dock from which he fell, was "over" navigable waters and was, therefore, *not* to be regarded as part of the dock (which under admiralty law is deemed land). Judge Hays dissented. He considered the structure a part of the dock, and the case, therefore, not within the statute.

All three judges, it will be noted—differing from the Sixth Circuit's *Nielsen* decision—considered the place of origin, and not the place of consummation of injury, controlling.

(c) IN THE FOURTH CIRCUIT in *Hastings v. Mann* (4 C. A., 1965), 340 F. 2d 910 (decided January 11, 1965, five weeks after *Nielsen*), Judges Haynsworth, Boreman and Bell, upon a libel in admiralty, denied jurisdiction in admiralty even though the claimant was standing in navigable waters, on an underwater structure, when he slipped and fell. 340 F. 2d at 912. The structure from which the claimant fell was a launching ramp which led from shore to deep water. Since it was affixed to land, the court, in accord with the traditional view, deemed it part of the land, and the case, therefore, beyond the reach of admiralty.

It will be observed that in the Second Circuit a structure "over" navigable waters (but affixed to the dock, *i.e.*, land) is deemed to be "upon the navigable waters of the United States," whereas in the Fourth Circuit a structure even though "under" navigable waters (but affixed to land) is deemed to be part of the land.

(d) IN THE FIFTH CIRCUIT there is now pending on appeal (Docket No. 21,770) *Atlantic Stevedoring Company, Inc. v. O'Keeffe* (S. D. Ga., 1963), 220 F. Supp. 881, where District Judge Scarlett applied the traditional rule to the Longshoremen's and Harbor Workers' Compensa-

tion Act. Decedent fell from the dock and met death in navigable waters. The court held the case not covered by the Longshoremen's Act. Why? Because (220 F. Supp. at 885):

> "I find that the locality of the accident was on the dock and that the dock is not a part of the navigable waters of the United States * * *."

As will be observed, the court—differing from the Sixth Circuit's *Nielsen* decision—held the place of origin, and not the place of consummation of the injury, controlled.

Where like problems arise in so many circuits, and receive differing answers, the situation is one this Court should examine.

2. The foregoing considerations were not presented to the Court in the petition for a writ of certiorari. Three of the cases were decided after *Nielsen;* in the fourth the appeal is still pending, undecided. The conflicting standards adopted in those cases satisfy, as counsel believes, the requirements of Rule 58 Paragraph 2, concerning rehearing.

Respectfully submitted,

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June 22, 1965.

Certificate of Counsel.

As counsel for Petitioner, The Interlake Steamship Company, I certify that the foregoing Petition for Rehearing is presented in good faith, and not for delay, and is restricted to grounds which are, as I believe, intervening circumstances of substantial and controlling effect within the meaning of Rule 58, Paragraph 2, and constitute also substantial grounds not previously presented to the Court in the petition for certiorari.

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